pursuer of the sum of £4521, 7s. 5d., with the legal interest thereof from the date of signeting of the summons in the cause till payment."

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Taylor Innes—Begg. Agents—Bruce & Kerr, W.S.

Counsel for Defenders — Pearson — Low. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, June 29.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

RAE *v.* MEEK AND OTHERS.

Reparation — Agent and Client — Professional Responsibility — Process — Separate Defenders.

Beneficiaries under a trust brought against the trustees and the law-agents under whose advice they were alleged to have acted, an action to have them jointly and severally, or according to their respective liabilities, ordained to replace funds lost through the alleged gross negligence of the trustees and the alleged gross negligence and want of skill of the law-agents. The Court (*alt.* judgment of Lord M'Laren, and distinguishing from *Robertson* v. *Fleming*, 4 Macq. 167) *allowed* a proof in the action as laid against both defenders.

Mr and Mrs Robert Reid Rae were married in 1852. An antenuptial contract was entered into whereby certain trustees, John Meek and others, were appointed. Mrs Rae, in respect of certain provisions and obligations by Mr Rae in full of her legal rights, conveyed to the trustees for the purposes of the trust her entire property, which consisted of certain heritage, a share in the Glasgow waterworks, and £2500, the total value of what she conveyed being £5000. Certain rights were by the contract conferred on Mrs Rae and on the children of the marriage. The trustees had powers of sale and of re-investing the price in purchasing heritage, feu-duties, &c., bank stocks, or in heritable securities, and on such personal security as they approve, declaring "that the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases."

In May 1874 the trustees received the sum of £4750, being nearly the whole capital of the trust estate, for investment.

This was an action by the two children of the marriage against John Meek, Robert Rae, and Mrs Rae, the accepting and acting trustees who were acting in May 1874 in the transaction after mentioned, and also against the firm of Hotson & Howie, writers, Glasgow, Robert Howie, the surviving partner of that firm as such and as an individual, and H. A. Hotson, son of and universal disponee of the deceased John Hotson, the other partner, and also against the trustees as trustees, concluding for declarator that the defenders were conjunctly and severally or in such way and manner as the Court should decide, bound to make payment of £4500 to the trustees as trustees, in conformity with the trust created by the antenuptial contract and for decree ordaining them to make such payment.

The pursuers stated that they had a right on the decease of the surviving parent to have the estate paid over to them.

They also stated that Hotson & Howie were agents in the trust, and were instructed by the trustees on 30th January 1874 to look out for an investment for the sum of £4750 above mentioned; that at a meeting of the trustees, in Hotson & Howie's office, it was agreed to lend £4500 to William Anderson on the security of buildings in Gallowgate which had been valued at £6500 by an architect, provided Mr Hotson should be satisfied with the title; that £4500 was thereafter lent to Anderson over that property at 5 per cent.; that the property was subject to a heavy annual feu-duty. The Gallowgate, they averred, was one of the poorest parts of Glasgow, and prior to the City Improvement Trust having acquired said ground, the ground was covered with old houses, which were let at small weekly rents which were difficult to collect. Mr Anderson was a spirit-dealer in Glasgow, and the buildings he proposed to erect on the said property consisted of shops below and of warehouses and workshops above, and these buildings were finished about the end of the year 1875. "So far as erected on the subjects conveyed to the said marriage-contract trustees, their cost, it is believed, did not exceed £4000. The buildings were financially a failure, and it is believed and averred that from the first they never in any year realised sufficient to pay the feu-duty. It is certain that they never have done that since the year 1878, and it is believed and averred that they never will. The said sum of £4500 has thus been wholly lost to the trust estate. The said Jessie Croil or Rae is presently sixty-eight years of age, and her husband the said Robert Reid Rae is also presently sixty-eight years of age, and they are now almost without means of support. The pursuers are also without means of support, further than what they can earn themselves. The only means which they had to rely on were the sums in charge of the said trustees, but which have now been almost entirely lost. It is believed and averred that neither the trustees nor their law-agents made any inquiry to ascertain what revenue the property yielded after it was completed. It was their duty to have done so, and had they made such inquiry they would have found that the property was almost all unlet, and that the portion let yielded a sum much less than the ground-annual. If it be true that the property could have been sold at any time during 1875-9 for £7000 [as was alleged in answer], it was the duty of the trustees and their law-agents to have called up the bond. The trustees and their law-agents thus grossly failed in their duty, and the loss of the bond arose, *inter alia*, from such failure." "The said sum of £4500, and interest thereon, was lost to the trust estate through the gross negligence and violation of duty of the said trustees who were present at the meeting of the 5th May 1874, and through the gross negligence and want of skill of the said Messrs Hotson & Howie, the agents in the trust. The investment was one which no prudent or reasonable man would ever have made, and there were plenty of good and safe investments to be had for the money. The said Mrs Jessie Croil or Rae and her husband

were ignorant of business affairs and of what was a prudent investment, and they relied upon the knowledge and skill and carefulness of Mr Meek and of Messrs Hotson & Howie. It was gross negligence and want of skill on the part of Mr Meek and the latter to allow the trust funds to be invested on the said subjects, because, *inter alia*, the buildings which it was proposed should be erected were of a purely speculative character, for which there was no demand in the locality, because their value had not been tested by an actual rental, and the defenders had not even before them, at the time of granting the loan, any estimated rental, and because the feu-duty annually payable was such that no person of prudence would have lent £4500 or any sum over the buildings subject thereto. The nature of the locality was well known to Mr Meek and the agents. It was impossible, without the grossest negligence, to make an investment which would immediately thereafter result in almost the whole of the trust estate being lost. The said Hotson & Howie grossly failed in their professional duty by allowing the trustees to invest in such a speculation. It was through their advice and on their instigation that the investment was made. It was their duty, as the professional advisers of the trustees, to have prevented their investing the trust funds on unbuilt or unlet property, the investment being of such a nature as is never sanctioned by agents for trustees."

It was admitted that Anderson was sequestrated in 1879 and subsequently discharged without composition. The heritable creditors, including the trustees, did not claim to rank in the sequestration.

Separate defences were lodged for (1) John Meek, (2) for Hotson & Howie, and Robert Howie, and (3) for H. A. Hotson, the substance of which on the merits was that the investment was carried through with all ordinary prudence and care both on the part of the trustees and on the part of the agents. The security was a perfectly eligible one, and ample at the time when the advance was made. It continued so until the failure of the City of Glasgow Bank, and the consequent depression of trade and deterioration of all kinds of property in Glasgow. The loss could not have been foreseen.

Meek maintained that the pursuers had no vested interest, and therefore no title to sue, and on the merits that he had not acted negligently.

Hotson & Howie, and Robert Howie stated that neither the firm nor Howie had been employed by the trustees as agents in the trust.

The pursuers pleaded—"The said principal sum of £4500 and interest thereon since the term of Whitsunday 1878 having been lost through violation of duty and gross recklessness and negligence of the trustees present at the meeting of 5th May 1874, and through the gross negligence and want of skill of their said law-agents, the pursuers are entitled to decree as concluded for."

John Meek pleaded—"(1) The pursuers have no title to sue. (2) The defender not having been guilty of violation or neglect of duty, as libelled, is entitled to absolvitor."

Hotson & Howie and Robert Howie pleaded—"(1) The pursuers have no title to sue. (2) The averments of the pursuers are irrelevant."

Hamilton Andrew Hotson pleaded—"(1) No title to sue. (2) The pursuers' averments are not relevant. In particular, it is not said that the law-agents were employed by the pursuers, but by the trustees, to whom alone they are answerable. (5) The loss having arisen through the general depreciation of property, from subsequent and unforeseen causes, no liability attaches to the defender."

The Lord Ordinary (M'Laren) after hearing counsel on the Procedure Roll dismissed the action.

"*Opinion.*—This is an action directed against trustees and their law-agents to enforce personal liability for loss resulting from investment of trust funds on bad security.

"I gave the pursuers the option of abandoning the action against the law-agents and the representatives of their deceased partner, but as this option was not exercised I have no alternative but to dismiss the action. I do not say that under no circumstances will a beneficiary have a direct action against the law-agents of the trust in respect of their negligence resulting in loss to the estate. On the contrary, I think that if the trustees refuse or delay to call the law-agent to account an action will be sustained at the instance of a beneficiary.

"But the ground of such an action is necessarily different from the ground of action against the trustees, because the duties which they are respectively alleged to have neglected are different. The duty of the trustee embraces the whole subject-matter of the investment, but he may discharge himself of that duty by shewing that he has taken proper professional advice on matters which fall within the scope of the duty of a professional adviser. Thus he may be advised by a law-agent as to the validity of the title to the proposed security, by a land valuator as to the value of the subject, and by a banker or accountant as to the rate of interest which he should demand. A law-agent's duty is limited to the special matter in which his advice is taken, but on the other hand he is responsible in a higher degree of diligence than a trustee, because he is a paid agent.

"It would, in my opinion, neither be just to the trustees nor to their law-agents to allow claims depending on different facts, raising different legal considerations, and inferring distinct degrees of responsibility to be tried under the same action and the same order of proof."

The pursuers reclaimed, and argued—The Lord Ordinary had decided the case in deference to the judgment in *Robertson* v. *Fleming*, 1861, 4 Macq. App. 167. That case did not apply here. It was perfectly competent not only to raise this action against the law-agents for the trust, but to do so in the same action in which the trustees were cited as defenders. The law-agents were employed for behoof of the trustees, who acted for the beneficiaries. There was, then, a relation established between the agents and the beneficiaries which did not exist in the relationship of the parties in the case of *Robertson* v. *Fleming*. They were entitled to a proof against all the defenders, and the averments on record were clearly relevant—*Miller* v. *Renton and Beattie & Sons*, December 8, 1885, 13 R. 309.

Robert Howie argued—There was no privity of contract between his firm and the pursuers. The firm was employed by the trustees, and were unknown to the pursuers in their legal character

as agents. It was incompetent, then, to sue them in this action.—*Robertson* v. *Fleming, vide supra; Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304; *Alleyne* v. *Darcy*, June 16, 1854, 4 Irish Chanc. 199; *Barnes* v. *Addy*, February 12, 1874, 9 Ch. App. 251. In this case it was held that an agent could not be made a constructive trustee merely because he acted as agent of the trust, unless he assisted the trustees in something illegal. (2) Even supposing a breach of professional employment could competently be inquired into in this action, there was no relevant averment of such on record with reference to the particular investment, and none of recklessness or negligence.

The trustees argued—(1) The action, as framed, was incompetent. It was not based on an alternative but on a cumulative liability or fault. If negligence was relevantly averred in both cases, it was negligence of a different kind and degree, that of a trustee in the one case and of a law-agent in the other. The Court could not, then, expiscate the rights of parties or apportion the amount in which it was sought to make them liable—*Taylor v. M'Dougall & Sons, supra; Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651. (2) There was no relevant case stated against them. The only substantive allegation of fault was quite insufficient.

A similar argument was stated for Hamilton Andrew Hotson.

At advising—

LORD JUSTICE-CLERK—In regard to the question decided by the Lord Ordinary, whether where a trustee acting under a marriage-settlement intends to invest part of the money in his hands, and employs an agent to make the investment, and the investment turns out faulty, the agent can be made responsible in the same action as the trustee by one of the beneficiaries who has suffered—I am of opinion that no case has yet decided that such proceedings are not competent. I think the principle of the case of *Robertson* v. *Fleming* does not arise here. I should therefore be disposed to negative the Lord Ordinary's ground of judgment, and to send the case to proof before further answer. But we have had an argument on relevancy, and I am far from saying that the record exhibits with lucidity or precision the precise grounds on which the pursuer proceeds. The statements in his record, however, although general, I do not think fall short of relevancy, because if the averments in articles 6 and 7 of the condescendence are proved I am far from saying the pursuer has not a good case against the trustee and against his law-agent. Where the record fails is that it lacks precision as regards the mutual duties and mutual errors of the two separate defenders. But I am not disposed to shut out the pursuer from a proof which I think ought to be short, and will probably disperse a good many of the perplexities that seem to surround the case at present. I therefore propose to recal the Lord Ordinary's interlocutor and to send the case to proof.

LORD YOUNG—That is also my view. I quite agree that there is no authority, and for my own part I see no good reason for refusing to allow two such sets of defenders to be called as defenders in the same action. I had, I own, considerable difficulty, just as your Lordship has had, about the relevancy of the record. I do not much like the record, and probably the explanation is that the pursuer has got a stumbling case. I agree, however, that there are averments within which, in spite of their generality, it would be unsafe to say that the pursuer could not possibly establish a case of liability, and therefore we cannot dismiss them on the ground of irrelevancy. I concur in the observation that the grounds of difficulty will almost certainly disappear on a short inquiry. The proof cannot be a long one. It will clear up much that is perplexing now, and in the result we shall be able substantially to acquit or condemn the defenders.

LORD RUTHERFURD CLARK—I agree. I hope the proof will be short. I must say I have had grave doubts as to the relevancy of this case, but at the same time I do not see how it can be disposed of satisfactorily in any other way than by sending it to proof so as to have the whole facts before us for our acquittal or condemnation of the defenders.

LORD CRAIGHILL was absent.

The Court recalled the Lord Ordinary's interlocutor, and before further answer ordered proof.

Counsel for Pursuers—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Counsel for Trustees—G. W. Burnet. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Messrs Hotson & Howie, and Robert Howie—Law. Agent—Robert D. Ker, W.S.

Counsel for Hamilton Andrew Hotson—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Wednesday, June 30.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HIGHLAND RAILWAY COMPANY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Railway—Running Powers—Occupier of Line—Liability for Assessment—Tenancy.

It was agreed between two railway companies that a short junction line should be formed in order to allow the trains of one of them, the N. Co., to run into a station belonging to the other, the H. Co. By the private Act carrying out this agreement the H. Co. were to lay down the line, and the N. Co. were to run over and use it, and to pay a percentage upon the outlay so incurred, and pay certain rent for the station, and proportions of servants' wages—the additional line being the exclusive property of the H. Co., and liable to be used by them, if they chose, as part of their undertaking. *Held* that the right of the N. Co. was one of running powers only, and that they were not liable as occupiers of the line to relieve the H. Co. of assessment or rates laid upon the occupiers thereof.